SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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Respondent.

REPLY BRIEF FOR PETITIONERS.

(Answering pp. 1-2.)

Although there was no formal order of consolidation, there was a *de facto* consolidation. The cases were argued together, and decided together.

QUESTIONS PRESENTED.

(Answering pp. 3-5.)

The issues are correctly stated in the Petition, pp. 1-7.

Can a district judge summarily enter judgment for $8,171.56 against a trial lawyer for the benefit of opposing counsel? Such summary recovery against a lawyer without statute or rule is unheard of in Anglo-American law, and should be reviewed by this Court.

In any system of jurisprudence based on the rule of law, summary punishment, that is punishment without a trial,

may never take place except on undisputed facts. The minute that the testimony of witnesses or other external evidence is required to sustain a charge, the power of the court to proceed summarily is lost, and all of the procedural requirements of the constitution are immediately in force.

Respondent really concedes the necessity of external evidence to sustain the charges, by attempting to cite such evidence. (pp. 12-15)

The principal charges of misconduct turn on evidence of events which took place outside "the actual presence" (F. R. Cr. P. 42a) or personal observation of the court, namely in Las Vegas, Nevada.

The attempt to justify the summary proceedings, and thereby avoid the constitutional requirements of procedural due process, on the basis of a "personal observation of the court" exception utterly fails. If left to stand, the instant opinion would make a nullity of the very important constitutional inhibitions aganst *ex parte* evidence, and the very fundamental constitutional requirements of confrontation, cross-examination and a factual hearing.

STATEMENT OF THE CASE.

(Answering pp. 6-16.)

The facts are correctly stated in the Petition, pp. 6-16.

Respondent is inaccurate in the following particulars:

(Page 7). "The door automatically locked when it was closed" only if a button were turned to the lock position. (A. I 186; A. II 461-462) Otherwise, the door could be opened from the outside.

One of the most disputed issues of the case was whether Donna Kiefel left the door unlocked for her husband, as he had directed when she left the casino. (A. I 479, 521, 560, 614; A. II 546, 604) Donna Kiefel herself did not

remember at the first trial if she had locked the door. (A. I 189)

(Pages 7-8) The investigation of the Clark County Sheriff's Office showed only that at some time someone "attempted" to shimmy the lock. (A. I 593; A. II 126, 127, 496)

(Page 8) Defendant's expert testified the door could not have been *forced.* If it had, the soft aluminum catchplate and strikeplate *"would have had to be destroyed."* (A. II 456). Hence, it was his opinion that the lock was never forced. (A. 456)

(Page 8) The contemporary medical records show Donna Kiefel was competent to make the numerous admissions that she left the door open. (A. II 787-788, 791-792, 800-806) Repeatedly, those records show Mrs. Kiefel was "coherent", "lucid", "alert", "oriented and rational." (A. II 800-806)

(Page 8) That one of the five persons to whom Donna Kiefel admitted she left the door open later disowned her contemporary police report (A. II 808) by saying, "I got together a story for the report" (A. II 652) proves nothing in respect to defendant, or its counsel.

(Pages 8-9) There were no innuendos or insinuations in the opening statement. We flatly stated we would prove Kiefel's admission to the telephone operator of his fight with Mrs. Kiefel. But for erroneous rulings by the trial court we would have presented this evidence. (See Petition, pp. 11-12, 37-39)

The operator's evidence corroborated other important evidence of Carl Kiefel's complicity in the crime, namely, (1) that after the occurrence he was found with blood around his wristwatch and the soles of his shoes (A. 663); (2) that he rendered his wife no assistance; and (3) that despite direct orders from the security officer Prolle, not to touch anything so as to destroy fingerprints, Carl Kiefel immediately grabbed the assault weapon and carried it to

the bathroom, thereby destroying the fingerprints. (A. II 98, 603, 613)

The first trial judge correctly said that the first critical issue of the case was: "Who inflicted the injuries, her husband or an intruder?" (A. 11) Failure of the second trial judge to permit consideration of this issue in the case may well account for the different verdicts reached.

(Pages 10-12) The facts and matters relating to charge II (Sharon Hamlin) are stated in Petition, pp. 13-14. See also p. 18, *infra* concerning the whereabouts of the original deposition.

Mrs. Hamlin was a very pedantic person who made certain meaningless changes and interlineations on the original of her deposition. During the first trial plaintiff's counsel Brandvik cross-examined her at length about those changes. (A. 519-522) Further, Reese Hubbard informed the court on November 9, 1965, a week before the trial started, that she was insisting on certain changes. (A. 349)

Thus, Respondent is not being fair with this Court in stating that such changes were "all unknown to plaintiff's counsel." (Brief, p. 10) Nor is he being fair with the Court in suggesting either that Hubbard procured the changes or tried to conceal them. (Brief, pp. 10-13)

None of the changes are in any way impeaching. At trial plaintiff's counsel described them as simply "questions of semantics." (A. II 547)

In all, there were only 15 changes in her entire 52-page deposition. (A. II 31, 33, 35, 36, 38-40, 49, 50, 54, 57, 61, 63) They eliminate only 25 words of the original transcript of the deposition. Aside from corrections of obvious errors of grammar and typing and elaborations of answers given, the "changes" relate almost entirely to negativing any inference that at 2:00 a.m., March 4, 1962, plaintiff "came to" or "regain[ed] consciousness" for the first time since the occurrence three days before. She simply "awoke." (A.

II 33, 35, 36, 38, 44, 50) Since Sharon had not previously treated plaintiff, she would not have personal knowledge of plaintiff's previous condition. (A. 516)

These changes which she made accord with the hospital records. (A. II 545) Those records, quoted at Def. Br. 9-11, use the terms "coherent" and "alert" on March 3, the day before the interview. (A. II 787, 792-794) The record of March 4, 1968, the day following the interview, shows plaintiff was "lucid at all times," "responds well when spoken to," and using "normal sentences." (A. II 787, 795)

The changes from "conscious" and "unconscious" to "awake" and "asleep" do not impeach Sharon Hamlin, and were fully described in the first trial. (A. 519-522)

A second change of "brain injury" to "head injury" (A. II 40) was also admitted in the first trial. (A. 521) Sharon Hamlin was not a doctor. It would be consistent with her training to use more neutral terms, leaving diagnoses to properly qualified physicians. There was no issue on the point.

Her remaining changes can be observed at pages 3, 13, 14, 23, 27, 35, 38, and 44 of the deposition. (A. II 31, 39, 46, 49, 54, 55, 57, 61, 63) They were completely inconsequential.

That plaintiff's counsel was not prejudiced by not having these "other changes" in hand for cross-examination at the first trial is conclusively shown by the fact that he did not cross-examine about them at the second trial. There, his only cross-examination was about the changes made by Sharon Hamlin to show (1) Mrs. Kiefel had been "asleep," rather than "unconscious," that she "awoke," rather than that she "came to" or "became conscious" for the first time since the occurrence, and (2) that she had a "head injury," rather than a brain injury. (A. II 546-551)

Those changes had been described by her to plaintiff's counsel during the first trial. (A. 519-521)

(Page 12) Re the "fight" between the Kiefels on the night of the assault.

Under the authorities relied on, Petition, pp. 11-12, 37-40, Tracy's evidence was admissible substantively, so that there was no occasion to lay an impeaching foundation.

(Page 12) There was no necessity for defendants to bring in witnesses to attest the verisimilitude of the door replica, since plaintiff (A. 194-195) and her then husband (A. 262) admitted that it correctly showed the operation of the lock and chain. The trial court ruled the interrogation proper. (Add. A. 31-33) When Kiefel finished testifying, the Court suggested its removal from the courthouse. (Add. A. 37)

(Page 15) The record relating to the *Singleton* charge is stated in Petition, pp. 14-15. Butterfield did state on cross-examination, when she was not being led by plaintiff's counsel, that she talked to the girl, rather than Jacobson. (A. 665) It is simply not true that Singleton was personally present at the Bell or Hamlin deposition taken by Frank Hall of Chicago, Mr. Hubbard's partner. A review of the two depositions fails to show his presence. (Reply App. 10-23) The depositions were merely taken on Singleton's premises by Mr. Hall. When Bell could not produce a certain tape, he was asked if he would telephone the Singleton office, "where we are now sitting" in the event he found it. (Reply App. 22)

We could have asked Bell to write us in Chicago about the tape if he found it, but he had never answered our previous correspondence. (Reply App. 18-19)

It is doubtful Singleton or anyone in his office ever knew of the request, since no one has ever found the alleged tape.

No evidence supports the court's finding that Singleton had been "retained . . . to represent defendant in [a] deposition taken in this case." (A. 40-41)

(Page 14) We do not suggest plaintiff should have "intervened" to obtain an affidavit from Singleton. Our position is simply that this entire piecemeal affidavit procedure, supplemented by *ex parte* inferences from other cases, is not a substitute for the "evidentiary hearing" required by the constitution, at which Singleton, Butterfield, Hubbard and Jacobson could be examined and cross-examined. (See Petition, pp. 20-26)

(Pages 14-15) There was no misconduct on our part in respect to the Witte deposition. Our objection at trial was simply that no order had been entered authorizing the deposition. (Add. A. 42) The deposition, however, was taken in Las Vegas without objection on the part of Frank Hall, the attorney attending the deposition. (A. I, 349-355) Nor did defendant move to quash the notice. (Add. A. 61) On these facts the court could easily have ruled one way or the other as to whether it would permit the deposition, already taken, to be read.

The lengthy hearing at which Hall and plaintiff's counsel Brandvik gave testimony showed no more than that the Witte deposition was taken without either agreement or objection. (Add. A. 68) Brandvik did not support the claim made here (Brief, p. 14) of an agreement to take the deposition.

(Pages 14-15) The remainder of the objections relating to the first trial are without merit. They fail to cite evidence. Respondent's record references are simply to their own pleadings or motions below.

The trial court correctly ruled, at the hearing on costs, that defendant was not required to stipulate that the physical exhibits 52A and B, which were found on the eve of trial after being long lost, were, in fact, the actual lock. (A. 660)

That we did not later at trial object to their introduction did not make it an act of bad faith on our part not to stipulate to their authenticity.

(SECOND TRIAL.)

(Page 15.)

1. Hubbard did not attempt to "slip" into the jury room an exhibit which had been denied admission on repeated occasions. (Add. A. 205-206) Defendant's exhibit 7, reproduced at A. II 827, was the 26th page of the lengthy, rather illegible hospital record. (44 pages) (A. II 786-805)

It was properly admitted as an exhibit in the first trial and was so marked. (A. 539) *Bartosh* v. *Ryan,* 344 Ill. App. 214, 219-220, 100 N. E. 2d 330 (1951). The exhibit was also sent to the jury room.

At the second trial the court failed to follow the ruling of the first judge. (A. II 539) The record, however, does not show that the exhibit was ruled on "on repeated occasions," as counsel suggests. (Brief, 15) We find but one ruling. (A. II 539) Hubbard's stated reason for including that exhibit in the group to be sent to the jury room in the second trial was stated as follows: "I understand that that is in evidence." (A. II 759; R. II 1348)

In a record running at that point to 1342 pages, with courts making differing rulings as to the same evidence it is understandable how a lawyer assembling a multitude of exhibits at the end of a case, might fail to recall which judge had ruled which way on each piece of evidence.

2. There was no bad faith in filing the notice of appeal from the new trial order as a part of the separate appeal from the costs judgment. The order granting a new trial was interlocutory. But, when plaintiff's counsel induced the trial court to enter the final "costs" judgment (A. I 141),

the order granting the new trial became reviewable on appeal. (See authorities cited in our Brief in Opposition to Plaintiff's Motion to Dismiss, Reply Appendix, pp. 27-31)

Moore's Federal Practice, 2d Ed., Vol. 6 (1965) § 59.15(1), pp. 3896-3897; *Conney* v. *Erickson* (1963, 7th Cir.), 317 F. 2d 247; *Kanatzer* v. *Chrysler Corp.* (1952, 10th Cir.), 195 F. 2d 104; *Berner* v. *British Comm. Pac. Airlines* (1965, 2nd Cir.), 346 Fed. 2d 532, *cert. den.* 382 U. S. 983; *Marshall's U. S. Auto Supply* v. *Cashman* (1940, 10th Cir.), 111 F. 2d 140; *Pettingell* v. *Fuller* (1939, 2nd Cir.), 107 F. 2d 933; *Standard Oil Co.* v. *Brown* (1956, 5th Cir.), 238 F. 2d 54.

Since the Seventh Circuit had stated in *Conney* that a new trial order could be reviewed incidentally to "an appeal from a final judgment *or any other appealable order*" (317 F. 2d 247, 248) (emphasis ours) we believed in good faith the Court of Appeals had jurisdiction. Indeed, had the Court followed *Conney* it would not have dismissed that appeal.

3. (Pages 15-16) Ward Halstead is not a physician, and hence not required to be called "Doctor." The Court may note the number of Ph. D.'s who do not use the term.

4. (Page 16) There was no error in regard to Donna Kiefel's admissions at the first trial that nothing was stolen from her purse. (See Petition, p. 30) (A. I 196) That the admission was subsequently stricken at the first trial is of no moment. Under Illinois law, "any statement of a party no matter when or where made is admissible as an admission." 18 Illinois Law & Practice, Evidence, § 131, pp. 262-263. Cleary, Handbook of Illinois Evidence 280, § 17.11 (2d ed. 1963), citing also, *Susemiehl* v. *Red River Lumber Co.*, 306 Ill. App. 430, 435, 28 N. E. 2d 143 (1940), aff. 376 Ill. 138, 33 N. E. 2d 211 (1941). The court simply misapprehended the evidence point.

REASONS FOR GRANTING THE WRIT.

(As to Hubbard, the Trial Lawyer.)

Reese Hubbard denied each of the charges of misconduct and claimed the right to see and cross-examine the witnesses against him. (A. 84-85, 91, 93-94)

He attached the affidavits or statements of thirteen sitting judges before whom he had tried cases as follows: five (A. 125); fifteen (A. 126); thirty-five (A. 127); thirty-five (A. 128); eight (A. 129); fifteen (A. 130); thirty (A. 131); thirty-five (A. 132); fifty (A. 133); seventeen (A. 134); eight (A. 135); thirty-five (A. 136); nine (A. 137). Each judge unqualifiedly vouched for his proper conduct.

The question now is can counsel by name calling and vituperation justify the denial of Reese Hubbard's right to see and cross-examine the witnesses against him and to offer evidence in his own behalf?

In *Willner* v. *Committee on Character & Fitness* (1963), 373 U. S. 96, 106; 10 L. Ed. 2d 224, 231, Willner had been denied a license to practice law. He showed that he was never afforded an opportunity of confronting his accusers, of cross-examining them and refuting them. This Court said: (p. 106)

> "We hold that petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed agianst him before either the Committee or the Appellate Division."

As stated by Mr. Justice Black in *re Oliver* (1948), 333 U. S. 257, 273, 92 L. Ed. 682, 694:

> "A person's right to a reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against

him, to offer testimony and to be represented by counsel."

Plaintiff's simplistic, *ad hominem* argument for fees (pp. 15-16) completely avoids this critical question.

A. Confrontation and Hearing.

(Answering pp. 34-36.)

Hubbard's right to see and to confront witnesses on the contradicted factual issues and to present opposing witnesses is fully established by the authorities cited in the petition, pp. 20-26.

Willner v. *Committee on Character & Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 37 U. S. Law Week 3247, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

None of these cases suggest that this valuable constitutional right may be cavalierly swept aside simply by changing the name of the proceeding to "costs" or by making the award payable to opposing counsel rather than the government as a fine.

More important, none of these important decisions accept respondent's argument (pp. 34-36) that a legal hearing concerning whether an "evidentiary hearing" is required can be a constitutional substitute for an "evidentiary hearing." Indeed, in the following decisions this Court has repeatedly refused to accept that line of argument. *Townsend* v. *Sain,* 372 U. S. 293, 312-313, 9 L. Ed. 770, 787-788, 83 S. Ct. 745 (1965); *Smith* v. *Yeager,* 21 L. Ed. 2d 246, 248, 89 S. Ct. 277, 278, 393 U. S. 122, 123 (1968)

It is simply not true (p. 35) that petitioner failed to object at the hearing on damages to the lack of a constitutional hearing on damages. (A. I 633, 634)

Nor is it true (p. 35) that all of the matters occurred within the "actual presence" personal observation of the court, so that evidence was unnecessary. F. R. Cr. P. 42(a). The principal charge, of preventing the Las Vegas reporter from coming to Chicago, turned on evidence of events which occurred in Las Vegas. (See Petition, pp. 19, 23, 24) The law is clear that when a court must "depend on statement made by others for his knowledge of these elements . . . "jurisdiction to proceed summarily is lost. *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925).

For the reasons stated in Petition, pp. 24-26, specific findings were required. The opinion of Feb. 28, 1966 granting the new trial is inadequate to constitute the findings required to be contained in the judgment of October 24, 1966, F. R. C. P. 52. This is most particularly so since the petition for costs and attorney's fees added additional charges of misconduct not urged in the motion for a new trial. *In re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1220, 20 L. Ed. 2d 117 (1968). As this Court there observed, the addition of new charges after the hearing voids the proceeding.

B. Contempt.

(Answering pp. 32-34.)

Petitioner misses the entire point of our contempt argument (pp. 16-18). It is simply that the contempt statute, 18 U. S. C. § 401, and the procedural limitations of rule 42 (F. R. C. P. 42) state the outer limits of a court's authority over a trial lawyer in his representation of his client. Were the opinion of the Court below allowed to stand, that statute and rule would be effectively nullified.

None of the decisions (pp. 32-35) cited is relevant. None involved an action against a trial lawyer. Further, none suggest that by changing the title of the proceeding from criminal to civil, the important constitutional requirements of notice, cross-examination, hearing and findings may be avoided.

If the cost proceeding be regarded as a prosecution for civil contempt the case law is clear that Hubbard had a right to be confronted by the witnesses and to cross-examine them. (See Petition, p. 29). In *Cohn* v. *Kramer,* 136 F. 2d 293, 295 (C. A. 6, 1943), the Court stated:

> "In a civil contempt proceeding for violation of a decree, the respondent is entitled to opportunity to controvert the charges against him; and when he denies the charges, the burden rests upon the petitioner to prove by evidence that the decree has been violated. If the facts alleged as violation are neither admitted nor proven, the respondent may not be adjudged in contempt. This is elementary law."

The fifth and eighth circuits have made similar holdings in *N. L. R. B.* v. *Whittier Mills,* 5 Cir., 134 F. 2d 725, 728; *N. L. R. B.* v. *Rath Packing Co.,* 8 Cir., 123 F. 2d 684, 685.

Hubbard's important constitutional rights are not to be disregarded simply because they are procedural. Justice Holmes correctly observed:

> "In the development of our liberty procedural law has been a large factor." *Burdean* v. *McDowell,* 256 U. S. 465, 477, 41 S. Ct. 1048, 1051, 65 L. Ed. 1048, 1051.

Similarly, Justice Frankfurter:

> "It is not for nothing that most of the provisions of our Bill of Rights are concerned with matters of procedure." (*Sacher* v. *United States,* 343 U. S. 24, 25, 96 L. Ed. 717, 722)

ATTORNEY'S FEES AND COSTS.

(Answering pp. 26-31.)

For the reasons stated in Petition, pp. 30-31, the unsolicited award against Reese Hubbard personally of one-third of all of the plaintiff's attorney's fees in the three lengthy appeals should be reversed. The judgment from which the trial lawyer, Hubbard, appealed was a novelty in Anglo-American jurisprudence.

On appeal it was reduced from $8,171.56 to $1,741.20 by eliminating plaintiff's attorney's fees in the trial court. In no sense could the appeal of Hubbard, the trial lawyer, be said to have been vexatious or prosecuted for delay.

Under the authorities cited in our Petition, pp. 31-33, the power to award attorney's fees on appeal is limited to cases where the judgment has been affirmed or the appeal dismissed as frivolous. Cf. 28 U. S. C., § 1912 ("Where a judgment is affirmed * * *") When the judgment is reversed or reduced, power to award attorney's fees on appeal is lost. *Globe Const. Co.* v. *Brewer,* 197 F. 2d 707, 708-709 (C. A. 5, 1952)

In the only contrary decision, to which we are cited (Brief, p. 30), *Jones* v. *Schellenberger,* 225 F. 2d 784, 794, the issue was not argued, but conceded.

For the reasons stated, *supra,* pp. 8-9, the filing by Hacienda [not Hubbard] of a notice of appeal from the new trial order as a part of its separate appeal from the costs judgment was not an act of bad faith and does not warrant imposition of costs against either Hubbard or Hacienda.

[Note: Petitioner, Reese Hubbard, was not the appellate counsel for either Hacienda or himself.]

The order granting a new trial was interlocutory. But, when counsel induced the trial court to enter the final "costs" judgment (A. I 141), the order granting the new

trial became reviewable on appeal. See authorities cited in our Brief in Opposition to Plaintiff's Motion to Dismiss, Reply Appendix, pp. 27-31.

Moore's Federal Practice, 2d Ed., Vol. 6 (1965) §59.15(1), pp. 3896-3897; *Conney* v. *Erickson* (1963, 7th Cir.), 317 F. 2d 247; *Kanatzer* v. *Chrysler Corp.* (1952, 10th Cir.), 195 F. 2d 104; *Berner* v. *British Comm. Pac. Airlines* (1965, 2nd Cir.), 346 F. 2d 532, *cert. den.* 382 U. S. 983; *Marshall's U. S. Auto Supply* v. *Cashman* (1940, 10th Cir.), 111 F. 2d 140; *Pettingell* v. *Fuller* (1939, 2nd Cir.), 107 F. 2d 933; *Standard Oil Co.* v. *Brown* (1956, 5th Cir.), 238 F. 2d 54.

Since the Seventh Circuit had stated in *Conney* that a new trial order could be reviewed incidentally to "an appeal *from a final judgment or any other appealable order*" (317 F. 2d 247, 248) (emphasis ours), we believed in good faith the Court of Appeals had jurisdiction. Indeed, had the Court followed *Conney* it would not have dismissed that appeal.

Further, it is certain that plaintiff's counsel did not devote one-third of their time on all three of these lengthy appeals to filing their successful motion to dismiss Hacienda's notice of appeal from the new trial order. That matter was disposed of quite summarily.

EXPERT WITNESS FEES.

(Answering pp. 37-38.)

For the reasons stated in Petition, pp. 33-34, and under the authorities there cited there was no authority for the award of expert witness fees from the first trial. *Henkel* v. *Chicago, St. Paul, U. & O. Ry. Co.*, 284 U. S. 444, 52 S. Ct. 223, 76 L. Ed. 386 (1932); *Motion Picture Co.* v. *Steiner*, 201 F. 63 (C. A. 2, 1912) (No such authority even if opposing counsel's conduct is vexatious.) *Green* v. *American Tobacco Co.*, 304 F. 2d 70, 77 (C. A. 5, 1912); *Euler* v.

Waller, 225 F. 2d 765, 766 (C. A. 10, 1951); *Marquez* v. *American Export Lines,* D. C. N. Y., 1967, 41 F. R. D. 386. These latter decisions have been express that a district court lacks such authority, at least in the absence of advance application before employment of the expert.

None of the decisions cited (p. 38) is in point. In none were expert witness fees allowed.

The judgment for $675.00 in expert witness fees from the first trial should be reversed.

REASONS FOR GRANTING THE WRIT.

(As to the Client, Las Vegas Hacienda, Inc.)

(Answering pp. 17-24.)

1. Hacienda's petition should be granted because of the unconstitutional use against it of matter dehors the record in the form of *ex parte* statements from cases in which it was neither a party, nor in privity with a party. (See Petition, pp. 34-35) *Hansberry* v. *Lee,* 311 U. S. 32, 40-41, 85 L. Ed. 22, 26, 61 S. Ct. 115, 132 A. L. R. 741; *Kolod* v. *U. S.,* 390 U. S. 136, 138, 19 L. Ed. 2d 962, 964, 88 S. Ct. 752 (1968). (All emphasizing the importance of an "adversary," "evidentiary" determination of all issues in a case.)

Similarly, even if the barrier of lack of privity could be overcome, the decision is in conflict with the line of authority barring use of past offenses to show a general disposition to commit offenses, and hence to commit the particular offense charged.

Respondent cites no authority in support of either action of the courts below, but merely suggests that these actions were in some way not prejudicial.

The use by the two courts below of admittedly improper matter was so explicit, that, apart from the issue of prejudice, the opinion should be reviewed to prevent its use as precedent to erode valuable constitutional rights.

Respondent's want of prejudice argument (p. 18) is that the improper matter dehors the record played no part in the court's findings of misconduct, but that it merely fortified their feelings of outrage. Respondent quotes (p. 18) the trial judge as stating that all of his findings were based on "its own observation." (A. 11-12)

The patent impossibility of this statement is elsewhere shown. (See pp. 2, 12, *supra*) The court could not possibly have had any "personal knowledge" of the events which took place in Las Vegas, Nevada on November 16, 1966, to cause attorney William Singleton to refuse to release reporter Stella Butterfield to come to Chicago to testify on November 17.

The only *evidence* in the record as to why Singleton or his office refused to reschedule his deposition was his statement to Butterfield that "it was a very important case." (A. I 665) Nothing contradicts Singleton's statement.

[Note: If it was not in fact "a very important case," Butterfield, the reporter, could easily have so stated, when plaintiff later took her deposition.]

The court could not possibly have had any personal knowledge based on "its own observation" as to whether Singleton was being truthful in stating that "it was a very important case." (A. I 665)

There was no contrary evidence whatever on this issue. (See Petition, pp. 14-15) In these circumstances the basis of the finding of impropriety in this matter by the two courts below must result from their general mistrust of Hubbard, an attitude which long antedated, and had its origins outside this case against your petitioner, Las Vegas Hacienda, Inc.

Similarly, in the case of each of the other two charges of misconduct relied on below it is impossible that the findings

were not based essentially on the admittedly improper matter from other cases.

As to Charge 2, by the court, of failing to file the original of the Hamlin deposition "in violation of the rules of court" (A. 10), respondent now concedes (Brief, p. 10) that it was not Hubbard's, but the Las Vegas reporter Butterfield's duty to file the deposition. Hubbard could not have filed the uncertified deposition. F. R. C. P. 30.

Rather, Hubbard is charged by respondent (p. 10) and by the Court of Appeals (A. 20) with making false statements concerning its whereabouts to conceal that Hamlin had made changes on its face. But Hubbard advised the court more than a week before she testified that she was insisting on changes (A. I 349) and she herself was cross-examined about them. (A. I 519-522) (See pp. 4-6, *supra*) Further, Hubbard's account of the whereabouts of the deposition was corroborated not only by Hamlin, but by the factual assumption of plaintiff's counsel's interrogation at the second trial. (A. II 552)

Respondent is completely in error (p. 10) in asserting that Hubbard did not return the deposition to Butterfield until four months after trial. What happened at that time is that Butterfield presented it a second time to Hamlin for signature and again received it back. (A. II 552, 781-2) This matter was all clarified by plaintiff's counsel during the second trial, by leading questions which assumed the correct state of facts. (A. II 552)

Normally, a lawyer's statement of fact during a trial is taken at face value. The ready rejection of Hubbard's factual statements by both courts below must have its origin outside the record in the admittedly improper matter considered by both courts.

To read the trial court's opinion on Charge 1 (the opening statement), one would gather that the operator Tracy,

whose testimony was promised in the opening statement, was in Las Vegas during the entire trial, rather than in Chicago, in the witness room, prepared to testify. (A. II 609, Add. A. 100) If she had testified, she could have substantiated the opening statement, and impeached Kiefel. (A. 276) Under the court's erroneous evidence rulings, however (A. I 277, 558-559), to present her as a witness to give evidence of Kiefel's declaration that he and his wife were having a fight and that she had put the chain on, would have been an empty gesture and disrespectful of the court.

The finding by the court of improper motive in failing to present Tracy as a witness could not have been based "personal observation," but, again, must have been based on the courts' long-standing general mistrust of Hubbard, arising out of the admittedly improper, *ex parte* matters dehors this record. Indeed, the trial court admits that its finding of improper "intent" in this regard was based in part on the past cases, to which this defendant was not a party.

"As to the other causes involving counsel, the court states merely that they cast *some illumination* on counsel's possible intent in the trial tactics employed." (A. I 629)

But, a finding of improper intent had to be the sole basis of this finding of "improper trial tactics." Absent such a finding of improper motive in failing to present the witness, Tracy, the rule comes into play that there is no impropriety in failing to present evidence, if such proof has been precluded by the effect of a court's evidence ruling. *Gideon* v. *Williams,* 336 Ill. 482, 489-490, 168 N. E. 514.

Because of the courts' extensive reliance on admittedly improper matter dehors the record, from other cases in which your petitioner was neither a party nor in privity with a party, this petition should be granted and the judgment reversed.

2. Review should be granted of the patently erroneous

evidence rulings of the trial court, because they were ignored completely by the Court of Appeals.

Citation of authorities (pp. 18-20) dealing with two serious, exhaustive reviews by courts below of legal and factual contentions thus misses the mark. Because of the court's attitude toward Hubbard, Hacienda has yet to have serious appellate review of its contentions seriously urged in the Court of Appeals.

Citations of authority (pp. 18-19) suggesting unlimited discretion on the part of the trial court to grant new trials also misses the mark because such discretion is itself a limit on the constitutional right of trial by jury. The constitutional right of jury trial and the court's discretion to set aside a jury's verdict are thus in fundamental collision, as has been recently recognized in a growing number of decisions setting aside such orders. (See Petition, p. 39) *Duncan* v. *Duncan,* 377 F. 2d 49 (C. A. 6, 1967); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*; 346 F. 2d 532 (2d Cir. 1965), *cert. denied,* 382 U. S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966); *Lind* v. *Schenley Industries, Inc.,* 278 F. 2d 79 (3d Cir.) (*En banc*) (1960), *cert. denied,* 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) and *Fassbinder* v. *Pennsylvania R. R. Co.,* 322 F. 2d 859 (3rd Cir. 1963) (*En banc*).

Review of the evidentiary rulings should be included in any grant of review, because they are simple, central to the case, and enable a complete disposition. The *Tracy* and *Carpenter* evidence was admissible under three well-established exceptions to the hearsay rule, each of which is established by important state and federal authority, including decisions of this Court. (See pp. 36-39)

Under Rule 43 of F. R. C. P. federal district courts are required to receive any evidence admissible under either federal or state rules of evidence. Review should be granted, in the exercise of this Court's supervisory jurisdiction, to prevent that broad rule of admissibility from becoming a nullity.

The attempted treatment of the evidence rejections as simply matters of discretion ignores that rule 43, is a broad rule of admission, not rejection. *U. S.* v. *Featherstone* (C. A. 10, 1963), 325 F. 2d 540, 542; *Rain* v. *Pavkov* (C. A. 3, 1966), 357 F. 2d 506, 509-510; 5 Moore's Federal Practice, § 43.04, p. 1327.

Review of the rejected evidence of Tracy and Carpenter leaves little doubt that Carl Kiefel was dismissed as a party to the suit on the very day the trial started, solely to prevent his damaging admissions to Carpenter and Tracy. (See Petition, pp. 9-12)

Respondent errs (p. 22) in stating we did not urge our three theories in the trial court. We even wrote a brief. (A. II 10-18)

It is of no moment that Kiefel's hearsay declarations were out of plaintiff's presence. (Brief, p. 19) All hearsay, whether admissible under an exclusion or not, is necessarily out of the presence of the opposing party, simply by definition. Otherwise, it would be an admission.

Carpenter:

The suggestion (p. 22) that Carpenter's evidence of Kiefel's declaration that he told his wife to leave the door open is uncorroborated by any evidence that she acquiesced in the plan is a bold misstatement of the record. After the accident she admitted to five different people, on three separate occasions that she had left the door open. (See p. 3, *supra*) Her admissions were established not only

by direct testimony, but by contemporaneous hospital and police records admitted in evidence. (A. I 601-602, 494, 539, 599; A. II 811, 807, 635, 794, 827, 808-809)

There can be no doubt Donna Kiefel acquiesced in her husband's request to leave the door open. In fact, according to Officer Wightman's report, it was one of the first things Carl Kiefel asked his wife when he first conversed with her at the hospital. "Did you leave the door unlocked?" Plaintiff replied: "I think so." (A. II 811; A. I 601-602)

Dixie Tracy:

Respondent is in error (p. 20) that an offer of proof was required at the first trial. The court's ruling re Carpenter that he would exclude any declaration of Carl Kiefel out of Plaintiff's presence precluded the necessity of such an offer. (See pp. 3, 19, *supra*) (A. I 558-559)

Tracy's evidence was offered substantively, rather than as impeachment. Thus, it was unnecessary (Brief, p. 10) at the second trial to lay a foundation by first interrogating the missing Carl Kiefel* about the conversation.

Nor is it relevant (p. 21) that Carpenter's and Tracy's testimony did not describe Kiefel's clothing identically. They did not view him at the same time. Assuming he did not change clothing, this discrepancy was for the jury, not the court, to weigh.

There is no error in the statement (Petition, p. 38) that Kiefel did not render assistance to his wife. The Prolle testimony was explicit:

> "Q. Was he attending her and giving her first aid? A. None, whatsoever." (A. 291; A. II 639-640)

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* Kiefel disappeared after a divorce between trials. (A. II 85-86)

Nor did he accompany her to the hospital, according to Dr. Gardner, the receiving physician. (A. 457; A. II 374-375)

Respondent's claim (p. 38) that the court's evidence rulings were in an area of discretion (Brief, p. 24) concedes it would not have been error to admit the Tracy and Carpenter evidence. If so, there was no impropriety on Hubbard's part in stating the substance of Tracy's testimony in his opening statement, in view of the admitted fact (Add. A. 100) Hubbard had brought her all the way from Las Vegas to testify and had her in the witness room of the federal courthouse.

The Tracy and Carpenter evidence was central to the entire case. Its exclusion was erroneous and seriously prejudiced petitioner Hacienda in both trials. That exclusion should be reviewed.

CONCLUSION.

For the foregoing reasons and for the reasons stated in the Petition, the petition of Hubbard, the trial lawyer, should be granted and the judgment against him vacated, because the entire "costs" proceeding is without valid precedent and is in fundamental conflict with the statute designed to protect the independence of trial lawyers to represent their clients.

Alternatively, Hubbard prays that certiorari be granted and

1. the award of expert witness fees be vacated, and
2. the remand for assessment against Hubbard of opposing counsel's fees on appeal be vacated, or
3. that the matter be remanded to the district court for a proper evidentiary hearing.

Las Vegas Hacienda prays that certiorari be granted and that the original judgment in its favor be reinstated, or that a new trial be granted.

Respectfully submitted,

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